No. 80-1437

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ALEXANDER L. STEVAS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ARMY AND AIR FORCE EXCHANGE SERVICE,
Petitioner

versus

ARTHUR EDWARD SHEEHAN
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the District Court possesses subject matter jurisdiction under the Tucker Act, 28 U.S.C. §1346 (a) (2) to hear an action brought by a former employee in the Executive Management Program against the Army and Air Force Exchange Service for monetary relief predicated upon an expressed or implied-in-fact contract.

TABLE OF CONTENTS

Page

Question Presented i

Opinion Below 1

Jurisdiction 1

Statute and Regulations Involved 1

Statement 6

Argument 9

Conclusion 23

TABLE OF AUTHORITIES

Page

Cases:

Augusta Aviation, Inc. v. United States, 500 F. Supp. 785 (1980) 18

Aycock-Lindsey Corp. v. United States, 171 F.2d 518 (5th Cir. 1948) 16, 17

Bodek v. Department of Treasury, 532 F.2d 277, (2d Cir. 1976), cert. denied 429 U.S. 849, 97 S. Ct. 137, 50 L. Ed 2d 122..... 16, 17, 21

Eastport S.S. Corp. v. United States, 372 F.2d 1002 (Ct. Cl. 1967), cert. denied 399 U.S. 911 (1970) 14

Keetz v. United States, 168 Ct. Cl. 205 (1964) 11

Merritt v. United States, 267 U.S. 338 (1925)..... 19

Morton v. Ruiz, 415 U.S. 199, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974) 16

Porter v. United States, 496 F.2d 583, 294 Ct. Cl. 355 (1974) cert. denied, 420 U.S. 1004, 95 S. Ct. 1446, 43 L. Ed. 2d 761 (1965)..... 15, 16

Ramsey v. United States, 101 F. Supp. 353, 121 Ct. Cl. 426 (1952), cert. deneid 343 U.S. 977, 72 S. Ct. 1072, 96 L. Ed. 1369 (1952) 22

Service v. Dulles, 354 U.S. 363 (1957) 16

TABLE OF AUTHORITIES (Continued)

Page

Spicer v. United States, 217 F. Supp. 44 (D. Kan. 1963), aff'd 332 F.2d 750 (10th Cir. 1964). 21

Thompson v. Rector, 83 U.S. App. D. C. 371, 170 F.2d 167 (1948). 22

United States v. Chandler, 410 U.S. 257, 93 S. Ct. 880, 35 L. Ed. 2d 247 (1973) 21

United States v. Hopkins, 427 U.S. 123 (1976). 9, 10, 11, 12, 13, 14, 20

United States v. Testan, 424 U.S. 392 (1976). 9, 10, 14

Wolak v. United States, 366 F. Supp. 1106 (D. Conn. 1973). 17, 21, 22

Vitarelli v. Seaton, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959). 16

Young v. United States, 498 F.2d 1211 (5th Cir. 1974). 11

Statutes:

5 U.S.C. 702 8

16 U.S.C. 590(a) 16

28 U.S.C. 1254(1) 1

28 U.S.C. 1331(a) 8

28 U.S.C. 1346(a)(2) .....i, 1, 8, 9, 14, 16, 17, 21

TABLE OF AUTHORITIES (Continued)

Page

31 U.S.C. 738(a) 21

Regulations:

Army Regulation No. 60-21/Air Force Regulation No. 147-15 (November 12, 1974) 2, 6, 16, 20

Treasury Department Regulations, 31 CFR, §315.25 21

OPINION BELOW

The Opinion of the court of appeals (Petitioner's Appendix A, la-16a) is reported at 619 F.2d 1132. The Order of the District Court (Petitioner's Appendix B, 17a) is not reported.

JURISDICTION

The Judgment of the court of appeals (Petitioner's Appendix C, 18a-19a) was entered on June 27, 1980, and a petition for rehearing was denied on September 26, 1980 (Petitioner's Appendix D, 20a-21a). The petition for a writ of certiorari was filed, after an extension, on February 23, 1981. and was granted on October 5, 1981 (J. A. 48). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. §1346(a)(2), provides in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulationof an execution department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy

Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

ARMY REGULATION NO. 60-21/AIR FORCE REGULATION NO. 147-15 (Nov. 12, 1974) provides in pertinent part:

Section II. EXECUTIVE MANAGEMENT PROGRAM

5-6. Purpose. The Executive Management Program (EMP) is intended to fulfill the continuing requirement of AAFES for highly qualified and dedicated executive employees who will be readily available to meet the worldwide executive personnel requirements of AAFES.

5-7. Executive Management Program definitions. a. EMP positions are positions so designated by the Commander, AAFES, to include all positions in the entry EMP grade level and above and such other positions as are necessary or suitable for the training and development of individuals for attainment of the EMP grade level.

b. An EMP employee is a United States citizen employee designated an EMP employee by the Commander, AAFES, who has acknowledged in writing that he understands and accepts the conditions of the EMP, as prescribed by the Commander, AAFES.

5-8. Nomination and designation to EMP status. Procedures for nomination, selection, and designation to EMP status will be as published by the Commander, AAFES. Entry grade level for EMP status will be established by the Commander, AAFES, subject to the approval of the Board of Directors. Employees who have previously attained EMP status at lower grade levels than that currently established as the entry grade level will

retain that status, provided they continue to meet the requirements under which they qualified. Such individuals, however, will not be eligible for benefits applicable to EMP grade levels until they attain the entry grade level for EMP as defined above.

5-9. EMP obligations and benefits. a. Obligations of EMP employees are as follows:

(1) EMP employees are obligated to develop and improve their abilities and efficiency to the fullest extent practical in fulfillment of the purpose and principles of the program.

(2) EMP employees are obligated to accept transfer throughout the worldwide AAFES, except when the Commander, AAFES, determines that individual circumstances justify withdrawal of a proposed transfer. In the absence of such determination by the Commander, AAFES, the EMP status of an EMP employee who declines to accept a proposed transfer may be withdrawn by the Commander, AAFES, and the employee will be subject to separation based upon declination of transfer in accordance with paragraph 3-22.

(3) EMP employees who are in the entry EMP grade level or above are obligated to accept the terms of EMP early retirement.

b. Benefits to EMP employees are as follows:

(1) Retention priority in reduction in force (para. 4-12 through 4-16).

(2) Longer notice periods based on length of service in case of certain separations (app.).

(3) Triple indemnity accidental death benefit and sup-

plementary life insurance benefits in accordance with the AAFES Group Insurance Plan.

(4) For EMP employees in the entry EMP grade level and above only, supplemental retirement benefits and retention of personal grade, regardless of assignment, except as provided in paragraph 5-10h.

c. EMP status may be withdrawn by the Commander, AAFES as provided in a(2) above, or upon determination of unsatisfactory performance in accordance with paragraph 3-2, for gross inefficiency, insubordination, willful violation of laws, regulation, rules, or procedures or for conduct off the job reflecting discredit on AAFES.

d. The Commander, AAFES, may separate an EMP employee for gross inefficiency or for cause, as, appropriate. Gross inefficiency is defined in paragraph 3-7b and cause in paragraph 3-8. Gross inefficiency may exist even though an exchange has been operated in such a way as to generate acceptable returns. The existence of satisfactory performance ratings is not conclusive upon a charge of gross inefficiency, but may be taken into account in determination of this issue.

e. Requests for separation under d above will be submitted to the Commander, AAFES, by the appropriate AAFES headquarters office or division director containing a complete statement of charges against the employee. The Commander, AAFES, will refer the charges to an officer or civilian official for investigation. The officer or civilian official will thoroughly investigate the charges and recommend to the Commander, AAFES, approval or disapproval of the proposed separation, giving all supporting facts disclosed by the investigation.

5-10. EMP selection and promotion. a The Commander, AAFES, will periodically review and establish, as considered necessary, the number and grade level of positions to be includ-

ed in the EMP and make recommendations as appropriate to the Board of Directors.

b. The EMP employee in the entry EMP grade level and above is granted a "personal grade" which does not fluctuate with nor depend on the position occupied (para 4-9).

c. Employees in the grade which is one grade below the entry EMP grade level and EMP employes in the entry EMP grade level and above, except those with personal grades of USP 15, may be promoted upon recommendation of a Central Promotion Board and approval by the Commander, AAFES. EMP employees with personal grade of USP 15 may be promoted upon recommendation of a Central Promotion Board and the Commander, AAFES, and approval by the Board of Directors.

d. The Commander, AAFES, will appoint Central Promotion Boards as appropriate to meet not less often than once each year. Central Promotion Boards will be composed of individuals senior to the grades under consideration for promotion. The boards will have a minimum of 5 members, and normally the chairman will be a senior field grade or general officer.

e. Central Promotion Boards will function as follows:

(1) Review pertinent records furnished by Personnel Division, Headquarters AAFES, of each employee who meets the criteria established by the Commander, AAFES.

(2) Identify and recommend for EMP status and/or promotion those employees who have demonstrated exceptional ability and have the greatest potential for performing successfully at the EMP grade level.

(3) Identify and recommend courses of action which

will enable AAFES to more effectively develop any of the executives under consideration. Recommend a course of action, as appropriate, concerning executives who have been identified through prescribed performance evaluation as marginal.

f. The Commander, AAFES, may approve or disapprove the recommendations of Central Promotion Boards.

g. No employee or new appointee will be granted an EMP grade without the approval of the Commander, AAFES.

h. Personal grades of EMP employees will be withdrawn upon -

(1) Loss of EMP status in accordance with paragraphs 5-9a(2) and 5-9c.

(2) Downgrade pursuant to e(3) above and paragraph 4-6b to a grade level below the entry EMP grade level.

STATEMENT

On or about July 2, 1962, respondent was first employed with the Army and Air Force Exchange Service ("AAFES") as a computer programmer. Thereafter, in and about 1967, respondent entered into a different employment contract with AAFES in a special program known as the Executive Management Program ("EMP").

According to the regulation of AAFES, and in particular AR60-21/AFR 147-15, c. 5, Section II paragraphs 6-10 ("EMP Regulations"), Respondent was required to execute an employment contract in writing acknowledging and accepting the conditions of EMP. As an EMP employee, respondent had certain special obligations and special benefits as outlined in the EMP Regulations. In fact, the obligations of the EMP employees were substantially different, and more onerous than

the obligations of other AAFES employees. These EMP benefits and obligations are more particularly itemized in the Complaint (¶ 5) (Joint Appendix 4), and in the EMP Regulations.

On March 16, 1976, respondent, while an EMP employee of AAFES serving as shopping center manager for the Fort Jackson Exchange in South Carolina, received advance written notice of termination based upon conduct off the job that allegedly reflected discredit on AAFES and rendered respondent's retention incompatible with the best interests of AAFES. The written notice was received by Respondent immediately after Respondent pled guilty to four misdemeanor offenses of simple possession of illegal drugs. Respondent was subsequently terminated on April 19, 1976, and immediately pursued his administrative appeal.

During the administrative appeal, the hearing examiner for AAFES heard testimony andfound, ***inter alia***, from the evidence as follows (Complaint, ¶ 14) (Joint Appendix 29):

1. Respondent's conduct off the job did not reflect discredit on AAFES; and

2. Respondent's retention in some capacity was not incompatible with the present interest of AAFES.

As a result of these findings, the hearing examiner made recommendations which included the following:

1. Respondent be reinstated with back pay to his former grade and transfered to an assignment outside the southeast exchange region; and

2. That failure of AAFES to accord an appellate review at a level above the Commander, AAFES, for Respondent, because of his EMP employment, subjected AAFES to criticism and possible legal action on a charge of lack of administrative due process: and

3. That if the Commander determines the recommendations inappropriate, that the matter be heard by the appellate authority of the Chairman, Army and Air Force Exchange and Motion Picture Service.

Despite the findings and recommendations of the hearing examiner of AAFES. Respondent's discharge was sustained by the Commander, AAFES. Thereafter, Respondent brought the present action in the United States District Court for the Northern District of Texas. Respondent sought, *inter alia*, monetary relief, employee benefits, and reinstatement.

The District Court, without a hearing or arguments of counsel, dismissed the suit for lack of subject matter jurisdiction (Petitioner's Appendix B, 17a). Respondent timely appealed, and the Court of Appeals reversed and remanded.

The Court of Appeals bifurcated Respondent's claims for relief into two categories, to-wit: award for non-monetary compensation, and award for monetary relief. As to the award for non-monetary compensation, the Court of Appeals held that the District Court possessed subject matter jurisdiction from the confluence of 28 U.S.C. §1331(a) and 5 U.S.C. §702. As a result of this holding, the court reversed the decision of the District Court and remanded the case for trial on the merits. Petitioner did not seek a review by this Court of that portion of the Court's decision; therefore, jurisdiction over Respondent's claim for non-monetary relief is not at issue before this Court.

As to Respondent's claims for award for monetary relief, the Court of Appeals held that the District Court possessed subject matter jurisdiction to hear the controversy pursuant to the Tucker Act, 28 U.S.C. §1346(a)(2). It is solely this portion of the decision of the Court of Appeals which Petitioner seeks review.

ARGUMENT

THE DISTRICT COURT POSSESSES SUBJECT MATTER JURISDICTION UNDER THE TUCKER ACT, 28 U.S.C. §1346(a) (2) TO ENTERTAIN RESPONDENT'S CLAIM FOR MONETARY DAMAGES BASED ON RESPONDENT'S WRONGFUL DISCHARGE FROM THE EXECUTIVE MANAGEMENT PROGRAM OF THE ARMY AND AIR FORCE EXCHANGE SERVICE FOR ANY ONE OR MORE OF THE FOLLOWING REASONS:

A. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE DECISION OF THIS COURT IN *UNITED STATES V. HOPKINS*, 427 U.S. 123 (1976) AND IS NOT CONTRARY TO THE DECISION OF THIS COURT IN *UNITED STATES V. TESTAN*, 424 U.S. 392 (1976).

B. THERE IS AN IMPLIED-IN-FACT CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING OUT OF THE AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES.

C. THERE IS AN IMPLIED-IN-FACT CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING OUT OF SPECIAL AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES FOR EMPLOYEES IN THE EXECUTIVE MANAGEMENT PROGRAM.

D. THERE IS AN IMPLIED CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING OUT OF THE AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES WHICH IMPLIED CONTRACT IS PART OF AN EXPRESSED EMPLOYMENT CONTRACT BETWEEN RESPONDENT AND PETITIONER.

E. THERE IS AN IMPLIED CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING OUT OF THE AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES WHICH IMPLIED CONTRACT IS PART OF AN EXPRESSED EMP EMPLOYMENT CONTRACT BETWEEN RESPONDENT AND PETITIONER.

F. IF THERE IS NO IMPLIED-IN-FACT CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING OUT OF THE AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES, THEN THE DISTRICT COURT POSSESSES JURISDICTION TO AWARD DAMAGES IF THE DISTRICT COURT, AFTEK DEVELOPMENT OF A FULLER RECORD, DETERMINES THAT RESPONDENT SERVE AAFES PURSUANT TO AN EMPLOYMENT CONTRACT(S) (EITHER AS AN ORDINARY AAFES EMPLOYEE OR AS AN EMP EMPLOYEE).

ARGUMENT FOR POINTS A AND F

A. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE DECISION OF THIS COURT IN *UNITED STATES V. HOPKINS*, 427 U.S. 123 (1976) AND IS NOT CONTRARY TO THE DECISION OF THIS COURT IN *UNITED STATES V. TESTAN*, 424 U.S. 392 (1976).

F. IF THERE IS NO IMPLIED-IN-FACT CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING OUT OF THE AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES, THEN THE DISTRICT COURT POSSESSES JURISDICTION TO AWARD DAMAGES IF THE DISTRICT COURT, AFTER DEVELOPMENT OF A FULLER RECORD, DETERMINES

THAT RESPONDENT SERVED AAFES PURSUANT TO AN EMPLOYMENT CONTRACT(S) (EITHER AS AN ORDINARY AAFES EMPLOYEE OR AS AN EMP EMPLOYEE).

This Court's decision in *United States v. Hopkins*, supra, is controlling over the instant case. Hopkins was discharged from his position as a civilian employee of the European Exchange System of AAFES for alleged acts of misconduct incompatible with continued employment. Hopkins brought suit in the United States Court of Claims to recover, *inter alia*, back pay and appropriate allowances. His action was grounded on the claim that his separation was arbitrary and capricious, was a breach of his contract of employment, and was in violation of due process or prescribed regulations and procedures. The United States moved to have the petition dismissed for lack of jurisdiction. Before the Court of Claims, Hopkins argued that Exchange employees were not federal employees: therefore, his relationship with AAFES was contractual (the same as employees in the private sector). The United States, on the other hand, argued that Exchange personnel served by "appointment" rather than contract, and, therefore, the Tucker Act did not confer jurisdiction over his claim. The Court of Claims reaffirmed its earlier decisions of *Keetz v. United States*, 168 Ct. Cl., 205 (1964), holding that employees of the Exchange Service are not employees of the United States. With this holding, the Court of Claims analogized the relationship between Hopkins and AAFES to the private sector, holding that the relationship was created by contract, either expressed or implied. In its decision, the Court of Claims recognized that its holding was in conflict with the decision of the Court of Appeals in *Young v. United States*, 498 F.2d 1211 (5th. Cir., 1974). In *Young*, the Court of Appeals held that the Tucker Act did not confer jurisdiction to hear exchange employee cases.

This Court granted certiorari to resolve the conflict between

Hopkins and *Young*. In *Hopkins*, this Court held, contrary to the primary contentions of the government, that the Tucker Act applied to employment contracts. This Court states at 427 U.S. 126:

> Since the statute (Tucker Act) applies, by its terms, to "any express or implied contract" we hold that it is applicable to employment contracts as well as to those for goods or other services.

The government alternatively contended (as it did before the Court of Claims) that AAFES employees did not have a contractual relationship with AAFES, but served by "appointment." This Court analyzed many of the regulations of AAFES and concluded that such an employee could be employed by virtue of a contract or by appointment. This Court, therefore, reversed and remended the case for the threshhold determination of whether Hopkins was employed by virtue of a contract or served pursuant to appointment.

This Court stated at 427 U.S. 129:

> The Court of Claims, in reaching its conclusion that Plaintiff held his position by virtue of an expressed or implied contract, assumed that, once it was determined he was not an appointed federal employee, this result followed as a matter of course. It concluded that, in such event, his employment status was governed by a series of cases from the private sector of the economy, holding that the typical employee-employer relationship was contractual in nature. While we do not question the relevance of these cases by way of analogy should Plaintiff be determined not to have been an appointee, we hold the Court of Claims erred in its threshhold de-

> termination that AAFES employees could never serve by appointment. Rather, the question depends upon an analysis of the statutes and regulations previously described ***in light of whatever evidence is adduced on remand as to Plaintiff's particular status in this case.***
>
> It is thus apparent that the question of whether Plaintiff was employed by virtue of a contract or by appointment is not susceptable of determination at this time. Rather, ***the issue is one which must receive additional consideration from the Court of Claims after development of a fuller record*** (emphasis added).

Also important for the instant case, it this Court's affirmation of the Court of Claims holding that ***Hopkins*** complaint was sufficient under the Tucker Act to withstand the government's Motion to Dismiss on the grounds of lack of jurisdiction. This Court stated at 427 U.S. 130:

> Plaintiff's allegation that his discharge constituted a breach of contract of employment was sufficient, under the provisions of Pub. L. 91-350 (Tucker Act), to withstand the Government's Motion to Dismiss the Complaint on the grounds of lack of jurisdiction in the Court of Claims, and judgment of the court so holding is therefore affirmed.

In the instant case, as in ***Hopkins***, there has been no evidentiary hearing of any type to shed light on whether Respondent was employed by virtue of a contract or by appointment. Until such evidentiary hearing is held in the District Court, this Court is unable to determine whether Respondent was employed by virtue of a contract or by appointment. Until such determination is made, the District Court possesses juris-

diction pursuant to the Tucker Act.

Although *Hopkins* was remanded, the Court of Claims never made the determination as to whether Hopkins was employed by virtue of a contract or by appointment, because the case was settled by the parties prior to the decision on remand. Respondent submits that, even if Hopkins had been found to serve by appointment, such decision would not be controlling in the instant case, as Respondent was employed by contract under the special program known as EMP.

Petitioner's contention that the instant case is controlled by this Court's decision in *United States v. Testan, supra,* is erroneous. *Testan* dealt with the claims of two civil service employees who contended that their positions of employment were erroneously classified, and, as a result, they were entitled to reclassification and back payment of salary which they would have received had they been properly classified. This Court stated:

> The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforeable against the United States for money damages. The Court of Claims has recognized that the act merely confers jurisdiction upon it whenever the substantive right exists. *Eastport S S. Corp. v. United States,* 372 F.2d 1002, 1007-1009, 178 Ct. Cl. 599, 605-607 (1967). 424 U.S. 398.
>
> The Respondents do not rest their claims upon a contract; . . . At 399. 424 U.S. 399.
>
> The present action, of course, is not one concerning a wrongful discharge or a wrongful suspension. 424 U.S. 402.

From this language in ***Testan***, the implication is clear that a claim upon a contract and a claim for wrongful discharge of employment are substantive rights enforceable against the United States for monetary damages under the Tucker Act.

Therefore, based on the foregoing authorities, this Court should affirm the decision of the Court of Appeals and remand the case for development of a fuller record.

ARGUMENT FOR POINTS B AND C

B. THERE IS AN IMPLIED-IN-FACT CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING OUT OF THE AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES.

C. THERE IS AN IMPLIED-IN-FACT CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING OUT OF SPECIAL AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES FOR EMPLOYEES IN THE EXECUTIVE MANAGEMENT PROGRAM.

An implied-in-fact contract existed between Respondent and Petitioner that AAFES would adhere to its regulations in dealing with Petitioner. As stated in ***Porter v. United States***, 496 F.2d 583, 590, 294 Ct. Cl. 355 (1974) cert. denied, 420 U.S. 1004, 95 S. Ct. 1446, 43 L. Ed. 2d 761 (1975):

> The general rule in government contract law is that a contract implied-in-fact is one founded upon a meeting of minds, which, although not embodied in an expressed contract, is inferred, as a fact, from the conduct of the parties, in light of the surrounding circumstances, their tacit understanding.

The regulations of AAFES and the regulations of AAFES in

regard to EMP employees, as they relate to the termination of employment, create such an implied-in-fact contract. These regulations are particularly set forth in AR60-21/AFR 147-15, including, but not limited to, c. 3, Section II and c. 5, Section II. It is from these regulations that the parties: (i) derive an understanding concerning their rights and expectations in regards to termination of employment; and (ii) find the procedures to be used concerning such termination. In the instant case, there was a meeting of the minds and a tacit understanding of the parties, as contemplated by *Porter*, supra, that the AAFES regulations regarding termination of employment of Respondent would be followed. This meeting of the minds and tacit understanding of the parties was clearly manifiested by the subsequent actions of the parties. This tacit understanding is further reinforced by the well-established principal that federal agencies are bound to follow their regulations where the rights of individuals are affected. *Morton v. Ruiz*, 415 U.S. 199, 235, 94 S. Ct. 1055, 1074, 39 L. Ed.2d 270 (1974); *Service v. Dulles*, 354 U.S. 363, 388 (1957); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40, 79 S. Ct. 968, 972-73, 3 L. Ed. 2d 1012 (1959).

In support of its decision in the instant case that the AAFES Regulations were part of a collateral implied-in-fact contract, the Fifth Circuit relied upon *Aycock-Lindsey Corp. v. United States*, 171 F.2d 518, 520-21 (5th Cir. 1948) and *Bodek v. Department of Treasury*, 532 F.2d 277 n. 7 (2d Cir.) (per curiam) cert. denied 429 U.S. 849, 97 S. Ct. 137, 50 L. Ed. 2d 122 (1976).

The facts of *Aycock-Lindsey*, supra, dealt with a claim under the Soil Conservation and Domestic Allotment Act. 16 U.S.C. A., §590a, et seq. Jurisdiction was sought in the United States District Court pursuant to the Tucker Act, Title 28 U.S.C.A., §41(20) [now §1346]. The court of appeals, in reversing the district court's decision, considered the plaintiff's claim based upon regulations of the Federal Government serving as a foun-

dation for a contract theory and thereby coming within the purview of the Tucker Act. The court of appeals stated at page 521:

> "When, therefore, the Secretary of Agriculture published bulletins and promulgated rules providing for the payment of subsidies to those naval stores producers who accepted the offer by voluntarily coming under, and complying with, the Act, there was revealed the traditional essentials of a contract, namely, an offer and an acceptance, to the extent that we should hesitate to hold that there was not at least an implied contract to pay subsidies, in some amount, and that a claim thereunder would also be founded upon a regulation of an executive department."

Although the regulation involved in *Aycock-Lindsey* expressly provided for the payment of subsidies to individuals who complied with certain provisions of the Federal Soil Conversation and Domestic Allotment Act, it is not the application of that Act to the regulations that is important in the instant case. What is important is the court's finding that an implied contract existed arising from the relationship between the regulations in question and those who comply with those regulations with an expectation of compliance by the other party.

The Court in ***Bodek,*** supra, at page 279 F. N. 7, stated that jurisdiction was conferred by the Tucker Act, 28 U.S.C., §1346(a)(2) because "Treasury regulations are considered an implied part of the contract between the United States and a purchaser of its bonds. See ***Wolak v. United States,***" (cite omitted).

Petitioner argues that such cases are inapplicable or no longer the law. However, each of these cases, although their facts

differ from the facts of the instant case, clearly supports Respondent's position that an implied-in-fact contract exists.

In addition, the court of appeal's decision is further supported by ***Augusta Aviation, Inc. v. United States***, 500 F. Supp. 785 (1980). Although the facts in ***Augusta*** are distinguishable from the facts of the instant case, the theory of law is the same. In ***Augusta***, the District Court stated at 786:

> A contract implied-in-fact is one inferred from the conduct of the parties and the surrounding circumstances. (cite omitted) The contractual relationship between the parties here is based upon the numerous requirements imposed upon Plaintiff by the Veterans Administration. The Administration impliedly invites institutions to enroll veterans by promulgating rules and regulations governing their conduct. This represents one of the traditional essentials of a contract - the offer. (cite omitted)
>
> By compying with these regulations and enrolling veterans, an institution accepts the offer. The Administration benefits by having schools available which offer and provide "approved" educational programs to veterans, and the school is assured that a large part of the cost of the education will be paid. Thus, the arrangement included the final sine qua non of contract formation, that of consideration.

Applying the elements of implied-in-fact contracts to the facts of the instant case, there is an offer by Petitioner in the promulgated regulations regarding termination of employment. There was an acceptance by Respondent by voluntarily (i) entering into the employment of AAFES, both initially and subsequently in the EMP program, with the expectation that AAFES would comply with its regulations; (ii) continuing

employment by Respondent with the expectation that AAFES would comply with its regulations: and (iii) following and complying with the regulations at the time of Respondent's separation and termination. In fact, before Respondent was accepted as an EMP employee, he had to acknowledge in writing his understanding, *inter alia*, the regulations regarding termination of EMP employees. The final sine qua non is the benefit and burdens accepted by both parties in the employment agreement.

The Petitioner would have this Court believe that the court of appeals can not distinguish between a contract implied-in-fact and a contract implied-in-law. What is clear, is that Petitioner would prefer for the contract implied -in-fact to be construed as a contract implied-in-law, as a contract implied-in-law does not give rise to a substantive right under the Tucker Act. *Merritt v. United States*, 267 U.S. 338, 341 (1925). Petitioner is incorrect; not only did the court of appeals note the distinction between a contract implied-in-fact and a contract implied-in-law, the Court well reasoned the difference and found that there was a contract implied-in-fact. Therefore, based on the foregoing authorities, this Court should affirm the decision of the court of appeals and remand the case for trial on the merits.

ARGUMENT FOR POINTS D AND E

D. THERE IS AN IMPLIED-IN-FACT CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING OUT OF THE AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES WHICH IMPLIED-IN-FACT CONTRACT IS PART OF AN EXPRESSED EMPLOYMENT CONTRACT BETWEEN RESPONDENT AND PETITIONER.

E. THERE IS AN IMPLIED-IN-FACT CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING

OUT OF THE AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES WHICH CONTRACT IS PART OF AN EXPRESSED EXECUTIVE MANAGEMENT PROGRAM EMPLOYMENT CONTRACT BETWEEN RESPONDENT AND PETITIONER.

It is Respondent's position that Respondent was employed by AAFES, originally and subsequently as an EMP employee, pursuant to express contracts. Further, Respondent contends that the implied-in-fact contracts (discussed supra in Points B and C) are a part of these express employment contracts.

In the instant case, as in *Hopkins*, supra, there has been no evidentiary hearing at any time, in which a record has been made, to determine whether Respondent was employed by virtue of contract(s) or by appointment. The district court summarily dismissed Respondent's complaint without a hearing and without argument of counsel.

Respondent has not found, nor has Petitioner presented to this Court, any case or authority that specifically addresses the employment status of an EMP employee of the AAFES. The cases cited by Petitioner in regards to the status of employment of respondent as an ordinary AAFES employee are distinguishable from the facts of this case. The instant case, therefore, is one of first impression. Until such evidentiary hearing is held in the District Court, this Court is unable to determine whether Respondent was employed by virtue of expressed contract or by appointment, and this is more particularly so in regard to his EMP status. Therefore, the District Court possesses jurisdiction pursuant to the Tucker Act.

If the District Court determines that the Respondent was employed by express contract, it can further determine that there exists an implied contract regarding termination as a part of the express employment contract (AR 60/21 AFR 147-15, Section II) between Respondent and Petitioner under

reasoning of ***Bodek v. Department of Treasury***, 532 F.2d 277 (2d Cir. 1976), cert denied 975 Ct. 137, 429 U.S. 849, 50 L. Ed. 2d 122; ***Wolak v. United States*** , 366 F. Supp. 1106 (D. Conn. 1973); ***United States v. Chandler***, 410 U.S. 257, 93 S. Ct. 880, 35 L. Ed. 2d 247 (1973).

In ***Bodek***, supra, the plaintiff sued the Department of the Treasury to issue him duplicate bonds pursuant to 31 U.S.C. §738a and Treasury Department Regulations (31 CFR, §315. 25) Jurisdiction in the Federal District Court was conferred by the Tucker Act, 28 U.S.C., §1346(a)(2) because, as the Court noted at page 279 F. N. 7:

> "Treasury regulations are considered an implied part of the contract between the United States and a purchaser of its bonds. See ***Wolak v. United States*** [cite omitted]; ***United States v. Chandler***[cite omitted].

The Court in ***Wolak***, supra, noted:

> "That pertinent federal regulations are an implied part of the contract between the Government and a purchaser of savings bonds, and hold[s] that the Government has a consequent contractual duty to comply with its regulations in redeeming savings bonds." 366 F. Supp. 1110

In holding that the Government made an implied promise to abide by its regulations, the Court stated:

> "It is well established that Savings Bonds are issued pursuant to a contract between the purchasers and the United States. The Treasury Regulations constitute a part of that contract." ***Spicer v. United States***, 217 F. Supp. 44, 50

(D. Kan. 1963), aff'd 332 F.2d 750 (10th Cir. 1964)." 366 F. Supp. 1111

". . . When (the government's) paying agent redeemed plaintiff's bonds in violation of pertinent federal regulations, the Government incurred liability to plaintiff for the foreseeable damages plaintiff suffered by virtue of this breach of contract. ***Ramsey v. United States,*** 101 F. Supp. 353, 356-367, 121 Ct. Cl, 426 (1952), cert. denied 343 U.S. 977, 72 S. Ct. 1072, 96 L. Ed. 1369 (1952); ***Thompson v. Rector,*** 83 U.S. App. D. C. 371, 170 F. 2d 167, 169 (1948)." 366 F. Supp. 1112

While this line of cases is distinguishable from the instant case on its facts, the rules of law are applicable. If, on remand, the district court finds that an express contract of employment did exist between Respondent and Petitioner (which would give Respondent both a substantive right and jurisdiction under the Tucker Act), then, by analogy to the above-stated rules of law, the termination procedures contained in the AAFES regulations constitute an implied part of the express contract.

In the instant case, Petitioner submits that the regulations are merely a rule of administrative law and do not give rise to a claim for damages under a breach of contract theory. This same argument was offered and rejected in***Wolak,*** supra. In ***Wolak***, supra, the government argued that its regulations were not intended to benefit owners of the bonds but were designed to avoid administrative burdens. The Court stated "The government's position is supported by neither precedent nor common sense". 366 F. Supp. 1114.

Therefore, the implied contract between the parties arising

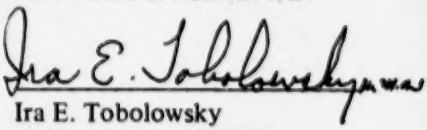
out of AAFES regulations is a part of the express employment contract(s) both of which give the district court jurisdiction pursuant to the Tucker Act.

CONCLUSION

Based on the foregoing, the judgment of the court of appeals should be affirmed and the case remanded to the district court for a trial on the merits. In the alternative, the judgment of the court of appeals should be affirmed on other grounds and the case should be remanded to the district court for trial on the merits.

Respectfully submitted,

TOBOLOWSKY & FRIEDMAN

By: 

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